IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 222

CIVIL AERONAUTICS BOARD, *Petitioner,*

v.

ARTHUR E. SUMMERFIELD, *Postmaster General of the United States,* and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General, *Respondents.*

No. 223

DELTA AIR LINES, INC., *Petitioner,*

v.

ARTHUR E. SUMMERFIELD, *Postmaster General of the United States,* and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General, *Respondents.*

REPLY BRIEF FOR BRANIFF AIRWAYS, INC., NORTHWEST AIRLINES, INC., AND TRANS WORLD AIRLINES, INC., AS AMICI CURIAE

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The respondents assert a strained and unreasonable interpretation of this Court's opinion in *Transcontinental & Western Air, Inc.,* v. *Civil Aeronautics Board,* 336 U.S. 601 (1949). They assert that the *TWA* case involved only a *service* mail rate, that the subsidy provisions of section

406(b) were not involved and that the rules in "traditional rate proceedings" are inapplicable to mail rates set by the Board because of the subsidy feature (Res. Br. pp. 13, 29-30).* This sidesteps the issues in the *TWA* case.

The proposal in the *TWA* case was that a *subsidy* rate be established prior to March 14, 1947, the date of the carrier's petition for rate revision. In that case the carrier argued that "Actually mail pay is 'Government subsidy in the form of mail pay' ", citing the Annual Report of the Civil Aeronautics Board, 1947, p. 5, and referring to a number of Board decisions. The carrier contended that because of the subsidy feature embodied in the need provision of section 406(b), the Act was not "a traditional regulatory public utility statute" (TWA Br. pp. 28-9).**

In striking contrast to the view now urged, the government brief in the *TWA* case took the position that "the Act establishes a public utility rate-making pattern for the determination of compensation for carrying mail by air" (Govt. Br. p. 46) and that the subsidy provision of the Act "does not change the rate-making method for determining mail pay" (Govt. Br. p. 28).

Thus the subsidy feature was a major issue. This Court specifically noted in the *TWA* case that the petitioner had placed "Considerable reliance" on the need provision of section 406(b) of the Act, but held that "such a standard has its counterparts in other legislation dealing with rate making . . ." The Court concluded that "The language of the Act does not suggest that Congress intended to break

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* "The *TWA* case held only that the Board has no power under section 406(a) of the Act retroactively to revise a closed domestic *service* rate for the period prior to the filing of a petition to fix a new rate. This Court did not decide any of the broader issues as to subsidy under Section 406(b) which the instant cases present, and to which different policy considerations are applicable," (Res. Br. p. 13, emphasis in original). See also numerous references to "service" rate at pages 38-40 of respondents' brief.

** We refer to the petitioner's brief in the *TWA* case, as "TWA Br." and the brief of the respondents in that case as "Govt. Br."

with these traditions of rate-making" and "The other rate-making provisions of the Act likewise follow the conventional pattern" (336 U.S. at 604, 5).

Respondents reveal the full conflict between their position and this Court's decision in the *TWA* case when they argue (Res. Br., pp. 29-30):

> "The Board's contention (Br. 38) that the decision below denies it the traditional authority of rate-making bodies to establish separate rate-making units and to set rates at a level which will sustain the particular unit confuses the issues in rate making with those in the awarding of subsidy."*

It was just this alleged distinction between traditional rate making and subsidy rates that this Court refused to draw in the *TWA* case. The respondents' argument here is nothing more than an expansion of the dissent in that case. See 336 U. S. at 609 (dissenting opinion).

The respondents further reveal their misunderstanding of the *TWA* decision and the operation of the Act when they assert that a mail rate "guarantees" a carrier a certain minimum return (Res. Br. pp. 10, 19, 44). There is no such guarantee. Indeed, in the *TWA* case the government brief on this point also was contrary to what is now urged, arguing that rates fixed by the Board "afford an opportunity to earn a fair return but do not guarantee that such a return will, in fact, be earned." (Govt. Br. pp. 34, 97) The argument then, which prevailed in this Court, was that once a rate was set, losses or profits were for the carrier's own account.**

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* Respondents cite as authority for this view the decision of the Board in *Pan American Airways Co., Transatlantic Mail Rates*, 1 CAA 220, 252-253 (Res. Br. p. 30). This was one of the cases unsuccessfully relied on by the petitioner in the *TWA* case (TWA Br. pp. 29-30).

** The government brief in the *TWA* case pointed to the fact that the Board had estimated, when it set TWA's domestic mail rates in 1945, that TWA would earn a return of 13.77 per cent

(continued on page 4)

The respondents' discussion of the *TWA* case concludes with this startling declaration:

> "The issue in awarding subsidy, however, is not the fairness of compensation for carrying the mail, but the extent of the carrier's need. And since the need is that of the carrier as a whole, the carrier's total subsidy requirements for the period involved can be finally determined only when both domestic and international subsidy proceedings have been completed." (Res. Br. p. 40)

If this last statement is true, the domestic mail rates of TWA for most of 1946 and up to March 14, 1947 are subject to review and adjustment despite the contrary holding by this Court in the *TWA* case.

This follows because TWA's international "subsidy proceedings" involving the period beginning February 5, 1946 to date have not been "completed". As explained in our main brief, TWA's international mail rates have been on a temporary basis since February 5, 1946, when its international service was inaugurated. If TWA's "need is that of the carrier as a whole" and if "the carrier's total subsidy requirements for the period involved can be finally determined only when both domestic and international subsidy proceedings have been completed", then TWA is entitled to have its *domestic losses* in 1946 and early 1947 taken into account in determining its "need" in the pending international mail rate case.

This is directly contrary to what this Court held in *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U.S. 601, when TWA was denied the right to any increase in its rates on account of domestic losses prior to March 14, 1947. Moreover, in that case TWA had requested the Board to consider the "need of the carrier as

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and that "Such a high rate of return is wholly inconsistent with the lack of risk involved in the petitioner's view that the Board is required to guarantee fair and reasonable amounts of mail compensation . . ." (Govt. Br. p. 39).

a whole", but this was rejected by the Board on the grounds that the Board had determined that "TWA's domestic and international operations are separate units for rate-making purposes" and TWA's domestic rate could not be revised prior to the date it was "challenged by the institution of a proceeding looking toward its revision".*

The respondents now contend that the making of a system-wide rate for TWA was an issue "not presented to this Court" (Res. Br. p. 39). Respondents further argue that when the Board in the *TWA* case stated that TWA's domestic and international operations were separate units for rate-making it "obviously was not purporting to decide how much subsidy TWA ultimately would need in its international operations" (Res. Br. p. 39).

The position of the respondents apparently is this: Although this Court held, in a case involving TWA's domestic rates, that the carrier could not have its domestic rates increased to recoup domestic losses incurred in 1946 and early 1947, the carrier can recoup such losses in rates to be set for its international operations. In brief, the respondents argue that the *TWA* case was an academic exercise.

This Court's opinion in the original *TWA* case was rendered in 1949, over four years ago. The opinion held that a carrier's domestic rate was closed for the period prior to the date it was challenged by the "initiation of a mail rate proceeding." The Court stated that a contrary conclusion would "have the tendency to transform [the Act] into a cost-plus system of regulation, a construction which would not harmonize with the apparent design of the Act." *Amici* submit that it would be manifestly unfair to make an "end run" around that decision and reopen domestic rates in the guise of fixing international rates.

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* Transcript of record, No. 387, October Term, 1948, pp. 88-90. The Board also stated:

> "TWA points out that it commenced operations on its international routes on February 1, 1946, and asks for a review of its system rates at least back to that date."

Conclusion

The judgment of the Court of Appeals should be reve
and the orders of the Board affirmed.

Respectfully submitted,

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Dated: December 8, 1953

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